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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 253

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 1, 1939
CERTIORARI GRANTED OCTOBER 9, 1939

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1 In United States Circuit Court of Appeals for the Sixth Circuit

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876, *Petitioners*

v.

THE NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petition to review and set aside a final order of the National Labor Relations Board designated "Decision and Direction of Election" and entered by said board on the first day of March 1939, in the matter of Consumers Power Company and International Brotherhood of Electrical Workers, Local 876, and designated upon the records of the National Labor Relations Board as case No. R-1004

(Filed April 5, 1939)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

2 International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union No. 876, Petitioners, being aggrieved by a final Order, hereinafter referred to, of the National Labor Relations Board, pursuant to authority conferred upon said Petitioners by Section 10 (f) and Section 9 (d) of the National Labor Relations Act of July 5, 1935 [29 U. S. C., Section 160 (f) and Section 159 (d)], respectfully pray this Honorable Court to review and set aside said final Order, designated "Decision and Direction of Election" and entered and issued on March 1, 1939, by said National Labor Relations Board in a proceeding before it entitled "In the Matter of Consumers Power Company and International Brotherhood of Electrical Workers, Local 876," and designated upon the records of said Board as Case No. R-1004.

In support of said Petition, your Petitioners respectfully show:

First: Your Petitioner, International Brotherhood of Electrical Workers, Local Union No. 876, is a lawfully organized, existing, and operating labor organization of wage workers, and a constituent of the said International Brotherhood of Electrical Workers, organized, existing, and operating in and throughout the several States of the United States and various provinces of the Dominion of Canada, and particularly in the State of Michigan, in and throughout which State this Honorable Court has and exercises its lawful jurisdiction, said Petitioner, International Brotherhood of Electrical Workers, Local Union 876, and its membership of wage workers, being subject to the jurisdiction, laws, and usages of said International Brotherhood of Electrical Workers as a constituent part thereof,

and both said International Brotherhood of Electrical Workers and said International Brotherhood of Electrical Workers, Local Union No. 876, being affiliated with the American Federation of Labor.

The Petitioner, International Brotherhood of Electrical Workers, is a lawfully organized and existing labor organization, with jurisdiction over its said Local Union No. 876, the Petitioner aforesaid, said Local Union No. 876 being composed of wage workers,
3 subject to the jurisdiction, laws and usages of said International Brotherhood of Electrical Workers, as hereinabove stated.

Said International Brotherhood of Electrical Workers, Local Union No. 876, is composed of wage workers in the employ of Consumers Power Company, hereinafter sometimes called the "Company," an operating public utility corporation, organized and existing under the laws of the State of Michigan, and which is engaged in the business of generating, distributing, and supplying power and electric service in the State of Michigan and within the jurisdiction of this Honorable Court.

Second: That the Respondent, National Labor Relations Board, hereinafter called the "Board," is an administrative board created by the National Labor Relations Act of July 5, 1935 (49 Stat. 449), and having the powers conferred, and charged with the duties imposed upon it by said Act.

Third: That Utility Workers Organizing Committee purports to be a labor organization, whose membership includes employees of the Consumers Power Company aforesaid, and is affiliated with the Congress for Industrial Organization.

Fourth: That this Petition is filed under the provisions of Section 10 (f) and Section 9 (d) of the National Labor Relations Act.

Fifth: That on December 22, 1938, upon the initiative and request of your Petitioner, Local Union No. 876, the National Labor Relations Board, in certain proceedings before it entitled, as above stated, "In the Matter of Consumers Power Company and International Brotherhood of Electrical Workers, Local 876," and designated upon the records of said Board as Case No. R-1004, issued a Decision and Direction of Election (amendatory of previous Decisions and Directions of Election issued theretofore in said proceeding on November 8, 1938, and November 23, 1938, respectively), directing the Regional Director of the Board for the Seventh Region, acting as agent for the Board, and subject to National Labor Relations Board Rules and Regulations, Series 1, as amended, to conduct an election by secret ballot among all employes of the Consumers Power Company, excluding general and assistant foremen, plant supervisors,
4 crew foremen, and other supervisory employees, with certain exceptions, office employes, office building janitors and watchmen, collectors, connected load inspectors, electrical, mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a

specific job and for not more than six months, part-time local service men and local service men not performing mechanical work in the regular course of employment, and storekeepers with supervisory powers who did not ordinarily do mechanical work, but including load dispatchers, meter readers and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, who were on the pay roll of Consumers Power Company for the pay roll period next preceding August 29, 1938, except those who had thereafter quit or been discharged for cause, to determine whether such employes named as being eligible to vote desired to be represented by Petitioner, International Brotherhood of Electrical Workers, Local Union No. 876, affiliated with the American Federation of Labor, or by the said Utility Workers Organizing Committee, affiliated with the Congress for Industrial Organization, for the purpose of collective bargaining, or by neither.

Sixth: That the wage workers and employes in the employ and service of said Consumers Power Company and who are embraced and included in the membership of said International Brotherhood of Electrical Workers, Local Union 876, embraced and included and embrace and include the various kinds and classes of employees and wage workers in the employ and service of said Consumers Power Company hereinabove, to wit, in the Fifth paragraph of this Petition, particularly described, designated, and enumerated as eligible to vote in said election, mentioned and referred to in said Fifth paragraph, and as possessed of the right and entitled to vote therein.

Seventh: That said amended Decision and Direction of Election provided for the holding of the election within seventy days from November 8, 1938, the date of the original Decision and Direction of Election; that pursuant to said amended Direction of Election the said Regional Director of the Board conducted an election by said employes of said Consumers Power Company by secret ballot from January 10 to January 13, 1939, to elect and designate the representative for collective bargaining as aforesaid.

Eighth: That thereafter said Regional Director of the Board, reported in an Intermediate Report filed by him on January 10, 1939, and caused to be served upon the parties, as the results of the election held as aforesaid, the following:

Total number of employees eligible	2,977
Total number of ballots cast	2,806
Total number of votes for Petitioner, International Brotherhood of Electrical Workers, Local Union No. 876	1,072
Total number of votes for Utility Workers Organizing Committee	1,164
Total number of votes for neither	506
Total number of challenged ballots	52
Total number of blank ballots	1
Total number of void ballots	11

As none of the above-named contestants had received a majority of the votes cast in the said election, the Board could not, within the provisions of the National Labor Relations Act, certify either

your Petitioner, International Brotherhood of Electrical Workers, Local Union No. 876, or said Utility Workers Organizing Committee, as representative of the employes of the Company for the purposes of collective bargaining.

Ninth: That thereafter, by letter dated February 8, 1939, the Board, by its Secretary, Nathan Witt, advised Mr. D. W. Tracy, International President of your Petitioner, International Brotherhood of Electrical Workers, that the Board had been notified by said Utility Workers Organizing Committee that it desired the holding of a run-off election in the case, and that the Board would direct the holding of a run-off election unless objection thereto was received within five days from the date of said letter; that while the text of the said notification by said Utility Workers Organizing Committee to the Board that it desired to hold a run-off election is not
6 available to your Petitioners, they aver that by letters dated respectively, February 2, 1939, and February 6, 1939, counsel for Utility Workers Organizing Committee and the Chairman thereof requested the said Board to direct the holding of a run-off election among the employes in the appropriate unit of the Company, providing for a choice only for or against said Utility Workers Organizing Committee.

Tenth: That in the meantime, however, that is to say, subsequent to the filing by the said Regional Director of the Board of his Intermediate Report showing the results of the election aforesaid, and prior to the time of the receipt by the said International President of your Petitioner, International Brotherhood of Electrical Workers, of the said letter of the Board, of February 8, 1939, intimations had been made, and widely circulated, by the Utility Workers Organizing Committee, that it only, or it and Neither, would appear on any secret ballot that would be used by the Board in any so-called run-off election, without the name of your Petitioner, International Brotherhood of Electrical Workers, Local Union 876, appearing upon said ballot at all, whereby the employes in said unit of said Company would be deprived of voting for your said Petitioner, and the election of a collective bargaining agency to represent the employes of the Company would not be an election at all between the principal and real contestants who embraced and embrace by far the greater number and substantial body of the employes of said company eligible to vote in said election, and between whom the real and only contest for the choice of the collective bargaining agency existed and exists.

Eleventh: That, thereupon, in response to the said letter of the Board of February 8, 1939, to D. W. Tracy, International President of your Petitioner, International Brotherhood of Electrical Workers, informing him, as aforesaid, that the Board would direct the holding of a run-off election unless objection thereto was received within five days from the date of said letter, your Petitioners, through their general counsel, in their respective behalfs, on February 11, 1939,

informed and notified the National Labor Relations Board, by letter and petition, in writing, at its offices in Washington, D. C., that they had no objection to the run-off election referred to in the
7 Board's above mentioned communication, if the contestants or candidates named upon the secret ballots used in the election would be the two organizations, namely, the Utility Workers Organizing Committee, and your said Petitioner, International Brotherhood of Electrical Workers, Local Union 876, which, respectively, had received the highest and the next highest number of votes in the last preceding election; further, that such condition was apposite and important with respect to the proposed run-off election, because intimations had been made, and rather widely circulated, by said Utility Workers Organizing Committee that it only, or it and Neither would appear upon the secret ballot, without the name of your said Petitioner, International Brotherhood of Electrical Workers, Local Union 876, appearing at all, whereby the employes would be deprived of voting for your said Petitioner, and the "election" of a collective bargaining agency to represent the employes of the Company would not be an election at all between the principal and real contestants who embraced decidedly the greater number and substantial body of the employes, and between whom the real contest for the choice of the collective bargaining agency lay; and your Petitioners, further in said writing addressed to said Board, requested and petitioned that said run-off election be held in the manner hereinabove mentioned as having been requested by them, namely, that the contestants or candidates be the two organizations which, respectively, had received the highest and the next highest number of votes, in the last preceding election, and stated that, if said election would be so held, they would have no objection to the same; and further, that if, however, the said election was not to be so held, or if your said Petitioner, International Brotherhood of Electrical Workers, Local Union 876, was not to appear upon the ballots to be used in said election as a contestant and candidate therein for collective bargaining agent to represent employes of the Company, then, your said Petitioners most respectfully and most decidedly objected to the suggested run-off election, which, if so held, would utterly deny and deprive them of their rights to participate in an election for the choice of a collective bargaining representative, as provided for and secured to them by the National Labor Relations Act, as well as by their fundamental
8 legal rights; and your Petitioners, further in said writing, set forth that, if said Board had any hesitancy or doubt about the propriety and justice of the said request of your Petitioners, International Brotherhood of Electrical Workers, and said Local Union, that said Local Union should appear upon the ballot in the run-off election in question, their counsel would, on behalf of said Petitioners, respectfully ask a hearing by the Board thereupon; and the said Board was further notified and requested in said writing that, if the run-off election should be held as requested by said Petitioners, a

revised eligibility list of employes as from August 29, 1938, to January 1, 1939, be set up and furnished to them as well as to their opponent in said run-off election; that a true duplicate copy of said original writing of February 11, 1939, addressed to said Board as aforesaid, is filed herewith marked "Petitioners' Exhibit No. 1," and prayed to be taken as a part of this Petition.

Twelfth: That subsequently, on February 24, 1939, a hearing of oral argument on the question of including your Petitioners as a contestant and candidate on the ballot in the run-off election was held by the Board at its offices in Washington, D. C.

Thirteenth: That after said hearing upon the part of the Board on February 24, 1939, as mentioned in the preceding paragraph herein, your Petitioners received no further communication or notice in the premises until March 1, 1939, when the Board entered and issued its Decision and Direction of Election, a true and duplicate copy of which Decision and Direction of Election, together with a communication dated March 1, 1939, from the National Labor Relations Board to counsel for your Petitioners, enclosing said copy of said Decision and Direction of Election, is filed herewith, marked "Petitioners' Exihibit No. 2," and prayed to be taken as a part of this Petition.

Fourteenth: That by said Decision and Direction of Election, entered and issued by said National Labor Relations Board on March 1, 1939, aforesaid, the said Board directed that the said question concerning representation which had arisen be resolved by a run-off election, in which the employes in the appropriate unit be given the opportunity to decide whether or not they desire to be represented by Utility Workers Organizing Committee, the Affiliate aforesaid of the Congress for Industrial Organization, and the said Board ordered and directed that "to determine representatives for the purposes of collective bargaining with Consumers Power Company, Jackson, Michigan, an election by secret ballot shall be conducted within 45 days from the date of this Direction, under the direction and supervision of the Regional Director for the Seventh Region, acting in this matter as Agent of the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among all the employes of the Company," excluding general and assistant foremen, plant supervisors, crew foremen, and other supervisory employes except as expressly included below, office employes, office building janitors and watchmen, collectors, connected load inspectors, electrical, mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service men who do not perform mechanical work in the regular course of employment, and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including load dispatchers, meter readers and bill distributors, plant janitors and

watchmen, and storekeepers other than those excluded above, who were on the pay roll of the Company for the pay roll period next preceding August 29, 1938, except those who have since quit or been discharged for cause, to determine whether or not they desire to be represented by Utility Workers Organizing Committee, for the purposes of collective bargaining.

Fifteenth: In the First Annual Report of the National Labor Relations Board, for the Fiscal Year ended June 30, 1936, Article 3, relating to the National Labor Relations Act and particularly its "Policy and Provisions," it is declared by the Board that "The Act, in its substantive and procedural provisions . . . makes no departure from traditional principles of substantive law or statutory administration."

And referring to the rights of employes guaranteed by Section 7, to self-organization and to bargain collectively through representatives of their own choosing, etc., and to the provisions of Section 9, relating to representatives and elections, it is further said by the Board:

"4. Representatives and Elections. Since collective bargaining is carried on through representatives of employees, the act follows established precedents for the factual determination of such representatives. Section 9 (a) provides that representatives selected by the majority of employees in a unit appropriate for collective bargaining shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. The act thus affirms the majority-rule principle, which is inherent in the practice of collective bargaining as in the practive of dealing through representatives generally; whether for governmental, corporate, or other purposes.

"Section 9 (b) authorizes the Board to determine in the appropriate case whether, in order to secure to employees the full benefit of their right to self-organization and collective bargaining, and otherwise to effectuate the policies of the act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"In order to resolve in an orderly way doubts as to the representatives of employees, the Board is specifically empowered to investigate questions concerning the representation of employees, to conduct elections in appropriate cases, and to certify to the parties the name or names of the representatives that have been designated [sec. 9 (c)]."

Section 1 of the said National Labor Relations Act states: "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of

representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 7 of the Act, title "Rights of Employees" provides:

"Employees shall have the right to self-organization, to
11 form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 9 of the Act secures to employees the choice or selection of representatives for collective bargaining. It provides:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

"(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

"(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

Sixteenth: Your Petitioners are advised and respectfully show that said National Labor Relations Act, in conferring upon and vesting in the employes in the appropriate unit the right to elect, and, in the exercise of such right of election, to choose, select, and designate by a secret ballot of such employes, and by a majority of them in such appropriate unit, the exclusive representation of all the employes in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment, and in expressly providing that said
Board shall "insure to employes the full benefit of their right
12 to collective bargaining," and in declaring it to be the policy of the United States, for the purposes of said Act, to encourage the practice and procedure of collective bargaining "by protecting the exercise by workers of full freedom of . . . designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual

aid or protection," and in again emphatically enacting in Section 7, that employes "shall have the right . . . to bargain collectively through representatives of their own choosing for the purpose of collective bargaining or other mutual aid or protection," intended as one of the principal, if not the principal, means of securing to employes the benefits, protection, security, and relief, designated by the Act in their behalf and in the general public interest, that said employes should have free, full, and unrestricted elective franchise, or suffrage, to be exercised by ballot, in the choice, selection, and designation by them of their representatives for collective bargaining; that such elective franchise or suffrage, in its nature, scope, and essentials, and particularly in its fullness, freedom, and unrestrictedness, and, in its relation to the majority-rule princple, is analogous to the elective franchise or right of suffrage, as declared by the Report of the Board above quoted, for "governmental, corporate, or other purposes," and, with respect to which, as the Board's said Report also states, "the Act, both in its substantive and procedural provisions . . . makes no departure from traditional principles of substantive law or statutory administration."

Your Petitioners, therefore, respectfully show that a predominant purpose of the said Act, for the effectuation of its policies aforesaid, was to insure, beyond denial or abridgement, upon the part of either employers or the Board itself, full, free, and untrammeled action upon the part of said employes in the choice or election of their representatives for the supreme and vital purposes of collective bargaining, and that such right of such employes, under and by virtue of said Act, and the principles of law applicable to the same, for the selection and designation of their own representation in said matters of rates of pay, hours of labor, working conditions,
and other material interests, is a valuable property right and a
13 valuable personal right, the impairment or deprivation of
which would result in irreparable damage and injury to said employes and, in this case, to your petitioners.

Seventeenth: Your Petitioners, furthermore, are advised and respectfully show that the said elective franchise and right of suffrage vested in such employes for the choice and election of representation for collective bargaining were and are not a mere and restricted right to vote for or against some one single candidate, whether an individual or organization, for collective bargaining representative, but, on the contrary, consisted and consists of the free exercise of a full, unabridged right of active and positive choice of such representative as each elector may or might desire to vote for as representative to fill said highly important office, as contradistinguished from a bare limited veto against, or expression of opposition to, a single designated candidate presented and appearing solely and alone upon the ballot; in other words, that the right of election conferred and guaranteed by the Act is the free and full exercise by

the electors of an affirmative selection and designation of representatives "of their own choosing." The plain, established meaning and import of the terms employed in the Act in this connection, namely, "choose," "select," "designate," "election," "ballots," "of their own choosing," "selected by the majority," "the full benefit of their right to collective bargaining," all consistently and uniformly lead to the one conclusion that the right of election so conferred was a right of affirmatively choosing by vote a person or organization to fill and exercise the office of representative for collective bargaining, and that when the voter or elector, as in this case, is deprived, in whole or in part, of his full right of exercising his own choice, selection, and designation of the representative in question, he loses his elective franchise as the same is intended to be vouchsafed to him by the Act.

By reason of the premises, your Petitioners are advised and respectfully show that the said Decision and Direction of Election entered and issued by said Board on March 1, 1939, is unauthorized by, and in violation of, the said National Labor Relations Act in the respects hereinabove indicated, and illegally, arbitrarily, and in violation of said Act, with respect to both its provisions and
14 policy, denies to your Petitioners, and deprives them of, highly important and valuable property rights and personal rights secured and guaranteed to them by the said Act; and your Petitioners further show that, for the reasons and in the respects aforesaid, the said Decision and Direction of Election entered and issued by said Board on said March 1, 1939, constituted and constitutes an unequal, discriminatory, confiscatory, and illegal application and administration of said National Labor Relations Act against these Petitioners directly resulting in the deprivation of their property and personal rights, which said application and administration of said Act are, under the Constitution of the United States and the Amendments thereto, illegal, unconstitutional, and void.

Eighteenth: Your Petitioners, moreover, respectfully show that said Decision and Direction of Election of said Board decided and determined a question and controversy between them and their opponent, aforesaid, the said Utility Workers Organizing Committee, and also between them and their employer, the said Consumers Power Company, finally affecting, prejudicing, and destroying, both immediately and in the future, the property and personal rights and the vital interests of your Petitioners, all directly and deeply involved in their right by ballot and election to choose, select, and designate their representative for collective bargaining, aforesaid, and finally subordinating their said rights and interests to the illegally preferred interests of said rival organization, the Utility Workers Organizing Committee; that said Decision and Direction of Election was passed with and for the final purpose of determining and settling the active dispute and contest between your Petitioners and said rival labor Organization, as to which of the two was lawfully entitled to represent and should represent the said employes,

in said unit, of said Consumers Power Company for the purpose of collective bargaining. That the actual immediate and future effect of said Decision and Direction of Election was, is, and shall be to evict and exclude your Petitioners entirely and finally from all and every possibility of being chosen or designated, by the employes in said appropriate unit in said election by ballot, as such collective bargaining representative, and utterly and finally to deprive them of all right upon their part to be a contestant or
15 candidate in said election for and of such representative; and, that, therefore, the said Decision and Direction of Election was and is in its substance, nature, operation, and effect in every respect, decisive, ultimate, and final with respect and relation to your Petitioners and all their paramount and vital rights and interests in the selection of representation for collective bargaining with their employer upon the supremely important subjects of rates of wages and hours and conditions of employment. The said Decision and Direction of Election, accordingly, was and is a final determination and order upon the part of said Board finally, adversely, and irretrievably deciding and disposing of the aforesaid rights, property, interests, security, and welfare of these Petitioners under said Act, and subjecting them to and entailing upon them, in those respects, final, permanent, and irreparable injury, loss, and damage, in violation of said Act as well as of the Constitution of the United States and the Amendments thereto.

Your Petitioners respectfully show that if the said Decision and Direction of Election of said National Labor Relations Board of March 1, 1939, aforesaid, be permitted to stand and be carried out in accordance with its terms and requirements, the rights and interests, including both their property and personal rights, of your Petitioners, hereinabove referred to, will be illegally, arbitrarily and in violation of the said Act and of the Constitution and its Amendments, denied them and annulled and destroyed, as a result whereof irreparable loss, injury and damage, for which they would be without remedy in a Court of law, would be sustained and suffered by them, which said unlawful, arbitrary and unconstitutional action upon the part of said Board, and which said loss, injury and damage, your Petitioners respectfully represent it is proper, just and required by virtue of said Act and Constitution for this Honorable Court to prohibit and prevent; and, further, that unless said final Decision and Direction of Election be set aside by this Honorable Court, as hereinafter prayed, permanent and irreparable injury to your Petitioners and to their property and personal rights and interests will be unavoidably imposed and inflicted upon them.

Wherefore, your Petitioners respectfully pray this Honor-
16 able Court to review the said Decision and Direction of Election entered and issued on March 1, 1939, by said National Labor Relations Board, and enter a Decree setting said Decision and Direction of Election aside as unauthorized, illegal, discriminatory, unconstitutional and void, and that, pending such Review

and Decree, said Decision and Direction of Election may be stayed and that such other and further decrees may be made herein as to this Honorable Court may seem just.

And as in duty bound, etc.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
By D. W. TRACY, *International President.*
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL UNION 876,
By W. B. PETTY,
Its International Representative and Business Manager.
ISAAC LORE STRAUS,
Munsey Building, Baltimore, Maryland;
SIGMUND LEVIN,
16 St. Paul Street, Baltimore, Maryland,
Solicitors for Petitioners.

17 [*Duly sworn to by D. W. Tracy; jurat omitted in printing.*]

Petitioners' Exhibit No. 1

FEBRUARY 11, 1939.

NATIONAL LABOR RELATIONS BOARD,
Shoreham Building, Washington, D. C.

Re: Consumers Power Company

Case No. R-1004

GENTLEMEN: International President D. W. Tracy of the International Brotherhood of Electrical Workers, and also Mr. W. B. Petty, International Representative of said Brotherhood at Grand Rapids, Michigan, have referred to me the communication dated February 8, 1939, of your Board, by its Secretary, Mr. Nathan Witt, stating that the Board has been notified by Utility Workers Organizing Committee that it desires the holding of a run-off election in the above case, and that the Board will direct the holding of a
18 run-off election unless objection thereto is received within five days from the date of the Board's said communication.

In the last preceding election held January 10–13, 1939, by direction of the Board, the employes of the Company were to determine whether they desired to be represented by the International Brotherhood of Electrical Workers, Local 876, affiliated with the American Federation of Labor, or by the Utility Workers Organizing Committee, affiliated with the Committee for Industrial Organization, or by Neither, and the ballot contained the name of the said C. I. O. organization, the name of the said I. B. E. W. Local Union, and also Neither. There were 2,977 eligibles, 52 ballots not counted, 11 ballots void, and 1 ballot blank; whilst 170 eligibles did not vote. The result of the election was declared to be as follows:

Utility Workers Organizing Committee (C. I. O.)	1,164
International Brotherhood of Electrical Workers, Local 876 (A. F. L.)	1,072
Neither	506

Of the three contestants in that election the C. I. O. Union and the I. B. E. W. Local Union, respectively, received the highest and the next highest number of votes, each of them receiving more than twice as many votes as the contestant, Neither.

On behalf of the International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876, I am writing respectfully to say that they have no objection to the run-off election referred to in the Board's above-mentioned communication, if the contestants named upon the secret ballots used in the election be the two organizations, above named, which, respectively, received the highest and the next highest number of votes in the last-preceding election.

This condition is apposite and important with respect to the proposed run-off election, because intimations have been made, and rather widely circulated, by the Organization above named
19 affiliated with the C. I. O., that it only, or it and Neither, would appear upon the secret ballot, without the name of the I. B. E. W. Local Union 876 appearing at all, whereby the employes would be deprived of voting for the I. B. E. W. Local Union, and the "election" of a Collective Bargaining Agency to represent the employes of the Company would not be an election at all between the principal and real contestants who severally embrace decidedly the greater numbers and substantial body of the employes, and between whom the real contest for the choice of the Collective Bargaining Agency lies.

The International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876, therefore, respectfully ask that said run-off election be held in the manner as hereinabove requested by them; and if it be so held, they have no objection to the same. If, however, the said election is not to be so held, or if I. B. E. W. Local Union 876 is not to appear upon the ballots to be used in said election as a contestant and candidate therein for Collection Bargaining Agency to represent employes of the Company, then the International Brotherhood of Electrical Workers and its said Local Union most respectfully and most decidedly object to the suggested run-off election, which, if so held, would utterly deny and deprive them of their rights to participate in an election for the choice of a Collective Bargaining Agency as provided for and secured to them by the National Labor Relations Act, as well as by their fundamental legal rights.

If the Board has any hesitancy or doubt about the propriety and justice of the above request of the International Brotherhood of Electrical Workers for its Local Union to appear upon the ballot in the run-off election in question, as above indicated, I would, on behalf of the International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876,

respectfully ask a hearing by the Board thereupon at a date convenient to the Board.

If the run-off election be held, as above requested by the International Brotherhood of Electrical Workers and its said Local Union, they also respectfully ask that a revised eligibility list of employes as from August 29, 1938, to January 1, 1939, be set up and be furnished to them as well as to their opponent in the run-off election.

With great respect, I am,

Very truly yours,

ISAAC LOBE STRAUS,
General Counsel for International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers Local Union 876.

ILS:GK.

Petitioners' Exhibit No. 2

NATIONAL LABOR RELATIONS BOARD

(LETTERHEAD)

MARCH 1, 1939.

Mr. ISAAC LOBE STRAUS,
Munsey Bldg., Baltimore, Md.

Re: Consumers Power Company, Case No. R-1004

DEAR SIR: We are enclosing herewith a copy of the Board's Supplemental Decision and Second Direction of Election in the above-entitled case.

Very truly yours,

NATHAN WITT, *Secretary.*

NLRB 92.

21 United States of America

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. R-1004

IN THE MATTER OF CONSUMERS POWER COMPANY AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 876

SUPPLEMENTAL DECISION AND SECOND DIRECTION OF ELECTION

(March 1, 1939)

On November 8, 1938, the National Labor Relations Board, herein called the Board, issued a Decision and Direction of Election [1] in

[1] 9 N. L. R. B., No. 67.

the above-entitled proceedings. On November 23, 1938, and on December 22, 1938, the Board issued Amendments to its Decision and Direction of Election.[1] The Direction of Election, as amended, directed the Regional Director for the Seventh Region, acting as agent for the Board, and subject to National Labor Relations Board Rules and Regulations—Series 1, as amended, to conduct an election by secret ballot among all employees of Consumers Power Company, herein called the Company, excluding general and assistant foremen, plant supervisors, crew foremen, and other supervisory employees except as expressly included below, office employees, office building janitors and watchmen, collectors, connected load inspectors, electrical, mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service men who do not perform mechanical work in the regular course of employment, and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including load dispatchers, meter readers, and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, who were on the pay roll of the Company for the pay roll period next preceding August 29, 1938, except those who had since quit or been discharged for cause, to determine whether they desired to be represented by International Brotherhood of Electrical Workers, Local 876, herein called I. B. E. W., or by Utility Workers Organizing Committee, herein called U. W. O. C., for the purposes of collective bargaining, or by neither. The Direction, as amended, provided for the holding of the election within 70 days of the date of the original Decision and Direction of Election.

Pursuant to said Direction of Election, as amended, the Regional Director conducted an election by secret ballot from January 10 to January 13, 1939.

On January 21, 1939, the Regional Director caused to be served on the parties his Intermediate Report on the conduct of the ballot. No exceptions to the Intermediate Report have been filed by any of the parties. As to the results of the secret ballot, the Regional Director reported the following:

Total number of employees eligible	2,977
Total number of ballots cast	2,806
Total number of votes for International Brotherhood of Electrical Workers, Local 876	1,072
Total number of votes for Utility Workers Organizing Committee	1,134
Total number of votes for neither	506
Total number of challenged ballots	52
Total number of blank ballots	1
Total number of void ballots	11

[1] 9 N. L. R. B. No. 67a; 10 N. L. R. B. No. 65.

Upon the expiration of the period for filing exceptions to the Intermediate Report, the Regional Director forwarded it to the Board in Washington, D. C. Thereafter, the Board received a letter, dated January 31, 1939, from Allan S. Haywood, chair-
23 man of U. W. O. C., in which he requested that the Board certify U. W. O. C. as representative of the employees of the Company within the appropriate unit, on the basis of the election theretofore held. By letter dated February 4, 1939, the Secretary of the Board informed Haywood that such certification would not be in accordance with the policy established by the Board, where no union had received a majority of the votes validly cast in an election. By letters dated, respectively, February 2, 1939, and February 6, 1939, counsel for U. W. O. C. and the chairman thereof requested the Board to direct the holding of a run-off election among the employees of the Company, providing for a choice for or against U. W. O. C. By letters dated February 8, 1939, pursuant to a request which had been previously made by D. W. Tracy, International President of International Brotherhood of Electrical Workers, the Secretary of the Board notified the Company, I. B. E. W., and Tracy that the Board would direct the holding of a run-off election unless objection thereto was received within 5 days from the date of the letters. By letter dated February 11, 1939, counsel for I. B. E. W. informed the Board that it had no objection to the holding of a run-off election in which the name of I. B. E. W. was included on the ballot, but that it did object to the holding of any such election in which that organization's name was not so included. I. B. E. W. also requested a hearing before the Board for the purpose of oral argument concerning its right to appear on the ballot.

On February 24, 1939, pursuant to notice duly served upon I. B. E. W., U. W. O. C., and the Company, a hearing for the purpose of oral argument was held before the Board in Washington, D. C. I. B. E. W. and U. W. O. C. were represented by counsel and participated in the argument.

In Matter of Interlake Iron Corporation and Amalgamated Association of Iron, Steel, and Tin Workers of North America, Local No. 1657, 4 N. L. R. B. 55, the Board, in reaffirming its policy of providing a space on the ballot, in elections involving two or more rival unions, in which a voter may indicate that he does not desire either of the named unions to represent him, stated that, "In the event that the election in the present case results in none of the three preferences obtaining a majority of the votes cast, we will,
24 upon request of the labor organization receiving the greater number of votes, promptly direct a run-off election in which the ballot will allow employees the opportunity to vote for or against this organization." This policy has, since its formulation,

been consistently followed by the Board.[3] We have considered the questions raised in the I. B. E. W. letter of February 11, 1939, and the considerations advanced by counsel for I. B. E. W. at the oral argument, and find no reason to depart from our established practice in cases of this kind.

A majority of the employees of the Company in the appropriate unit have indicated a desire to bargain collectively with the Company, although they have accorded neither of the rival unions a majority. As noted above, U. W. O. C., which received the greater number of votes validly cast in the election, has requested the holding of a run-off election. The Board finds that the question concerning representation which has arisen can best be resolved by the holding of a run-off election in which the employees in the appropriate unit will be given the opportunity to decide whether or not they desire to be represented by U. O. W. C. We will so direct. In the holding of this election the Regional Director is expressly authorized to use the United States mail in the manner provided in the first Amendment to Decision and Direction of Election in this proceeding, except that the date fixed by the Regional Director for the return of mailed ballots shall not in any event be later than the expiration of the period within which balloting is to be conducted by him.

SECOND DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

Directed that, as part of the investigation authorized by the Board to determine representatives for the purposes of collective bargaining with Consumers Power Company, Jackson, Michigan, an election by secret ballot shall be conducted within forty-five (45) days from the date of this Direction, under the direction and supervision of the Regional Director for the Seventh Region, acting in this matter as agent of the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among all the employees of the Company, excluding general and assistant foremen; plant supervisors, crew foremen, and other supervisory employees except as expressly included below, office employees, office building janitors and watchmen, collectors, connected load inspectors, electrical, mechanical, and civil engineers, efficiency men and junior engineers; draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service

[3] Matter of Fedders Manufacturing Company and Lodge No. 1753, Amalgamated Association of Iron, Steel and Tin Workers of North America, through Steel Workers Organizing Committee, 4 N. L. R. B. 770; Matter of J. J. Little & Ives Company and Bindery Women's Union Local No. 43, 6 N. L. R. B. 411; Matter of [redacted] Nut House and United Cracker, Bakery & Confectionery Workers of America, 8 N. L. R. B., No. 52; and Matter of Unit Cast Corporation and Steel Workers Organizing Committee, 8 N. L. R. B., No. 101.

men who do not perform mechanical work in the regular course of employment, and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including load dispatchers, meter readers, and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, who were on the pay roll of the Company for the pay-roll period next preceding August 29, 1938, except those who have since quit or been discharged for cause, to determine whether or not they desire to be represented by Utility Workers Organizing Committee, for the purposes of collective bargaining.

Signed at Washington, D. C., this 1st day of March 1939.

[SEAL]

J. WARREN MADDEN, *Chairman.*
EDWIN S. SMITH, *Member.*
DONALD WAKEFIELD SMITH, *Member.*
National Labor Relation Board.

26 National Labor Relations Board envelope. Register No. 69140. Post Marked: Washington, March 2, 1939; Baltimore, March 3, 1939. Addressed to Mr. Isaac Lobe Strauss, Munsey Bldg., Baltimore, Md. Attached.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876, PETITIONERS,

vs.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Filed Apr. 8, 1939. John W. Menzies, clerk.

Motion to the United States Circuit Court of Appeals for the Sixth Circuit, for stay of order of the National Labor Relations Board pending the final determination of a petition to review and set aside said order of the National Labor Relations Board

To the Honorable, The Judges of the the United States Circuit Court of Appeals for the Sixth Circuit:

International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876, Petitioners in a Petition filed on the 5th day of April 1939, in this Honorable Court to Review and Set Aside the Decision and Direction of Election, or Order, of the National Labor Relations Board, issued and entered by said Board on March 1st, 1939, in said Petition more particularly referred to, respectfully move this Honorable Court to stay the said Order of Decision and Direction of Election, until and after the final determination of the matters and questions raised and presented by said Petition, and for grounds of said Motion your Petitioners respectfully show:

1. That they, as hereinabove stated, have petitioned this Honorable Court to Review and Set Aside a Decision and Direction of Election, or Order of the National Labor Relations Board, entered and issued on March 1, 1939, which said election the said Board and its Regional Director for the Seventh Region, decided and determined on the 15th day of March 1939, should be held on the 11th, 12th, 13th, and 14th days of April 1939.

2. That your Petitioners desire to obtain a stay of the said Order of the Board pending the final determination of the matters and questions, and particularly the question of the legality and validity of said Order and of any election purported to be held thereunder and pursuant thereto, raised by their Petition to Review and Set Aside.

3. That for the reasons set forth in an affidavit, hereunto attached as part hereof, of Isaac Lobe Straus, of Counsel for your Petitioners in said Petition and proceeding, in support of the Petitioners' said Motion for a Stay of said Order of said Board pending the final determination of the matters and questions aforesaid, and particularly for the reasons, among others, set forth in said affidavit, that if said Order of said Board of Decision and Direction of Election be not stayed and if said election be held on said April 11th, 12th, 13th, and 14th, 1939, as further ordered by said Board and its Regional Director for the aforesaid Seventh Region, in such event the said Order of Decision and Direction of said Election will have been completely and finally executed and carried out, and said election will have been actually, fully, and finally held, conducted, carried out, and completed, so as to render the said Petition to Review and Set Aside said Board's Order of Decision and Direction of Election utterly futile, abortive, and nugatory, and ipso facto conclude the said matters and questions of law against your Petitioners and finally dispose of and preclude them from their lawful rights and interests, relating to and involved in the same as particularly set forth in said Petition, and finally deprive them of any hearing in, or any consideration by this Honorable Court of their rights and interests in the premises, subjecting them finally and without relief and without posibility of relief to the deprivation and denial of their said rights and interests, and to their irreparable loss and injury, as stated in their said Petition.

Wherefore, your Petitioners move and pray this Honorable Court to pass an Order staying the said Decision and Direction of Election, or Order, of the National Labor Relations Board, of March 1, 1939, until and including a reasonable time from and after the final determination of the matters and questions raised in and by their aforesaid Petition.

And, they will ever pray, etc.

(S) Taft, Stettinius & Hollister,
(S) Isaac Lobe Straus,
(S) Sigmund Levin,

Solicitors for Petitioners, International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876.

In the United States Circuit Court of Appeals for the Sixth Circuit

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876, PETITIONERS

vs.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Affidavit in support of motion for stay

STATE OF OHIO,
Hamilton County, ss:

I, Isaac Lobe Straus, with offices in the Munsey Building, Baltimore, Maryland, am of counsel for the Petitioners in the above-entitled proceeding in this Court, pursuant to Section 10 (f) and Section 8 (d) of the National Labor Relations Act, and am familiar with the matters and things therein involved and hereinafter stated.

2. The nature of the proceeding and the relief sought are fully set forth in the verified Petition for Review, which has been duly filed with the Clerk of this Court.

3. The above-named Petitioners, being aggrieved by a final Order, designated Decision and Direction of Election, of the National Labor Relations Board, dated March 1, 1939, ask a review and annulment of said Decision and Direction of Election, or Order, in which the said Board determined and ordered, among other things, that to determine representatives of the employees of the Consumers Power Company, the employer Company mentioned in said Petition for Review, for the purposes of collective bargaining with said Consumers Power Company, Jackson, Michigan, a run-off election by secret ballot be conducted within forty-five days from the date of said Decision and Direction of Election, or Order, under the direction and supervision of the Regional Director of said Board for the Seventh Region, among all the employees of said Company, with certain enumerated exceptions, to determine whether or not they desired to be represented by Utility Workers Organizing Committee, an Affiliate of the Congress for Industrial Organization, for the purposes of collective bargaining; that subsequent to said Decision and Direction of Election, or Order, of the Board, of March 1, 1939, it was on March 15, 1939, further ordered and directed that such election, in the manner and form as aforesaid, be conducted and held on April 11, 12, 13, and 14, 1939.

4. Compliance with the said Decision and Direction of Election, or Order, of the National Labor Relations Board and the carrying out and execution of said Order, by holding and conducting the said run-off election in substance, manner, and form specified and required

by said Decision and Direction of Election, or Order, of said Board, and particularly the conduct and holding of said election in substance, manner, and form aforesaid, on April 11, 12, 13, and 14, 1939, as directed and required as aforesaid, and before this Honorable Court may or shall have, or might or shall have had, any opportunity to consider, act upon, or render any judgment or decree, upon or pursuant to said Petition of the International Brotherhood of Electrical Workers and the International Brotherhood of Electrical Workers, Local Union No. 876, to Review and Set Aside said Order, would conclusively and finally deprive the Petitioners, whose membership embraces and includes employees of said Consumers Power Company eligible to vote in said run-off election, of the benefits, protection, security, and relief designed by said Act in their behalf and in the general public interest, in that the Petitioner, International Brotherhood of Electrical Workers, Local Union 876, would be eliminated and omitted from the ballot to be used in an election held in the manner and form ordered and directed to be held as aforesaid. That the elimination and omission of the name of the said Petitioner, International Brotherhood of Electrical Workers, Local Union 876, from said ballot as aforesaid, would restrict the elective franchise and right of suffrage invested in the membership of the said Petitioners, and guaranteed to it and them by the National Labor Relations Act, to the exercise of a mere right to vote for or against a single designated candidate other than the said Petitioners; and that, unless the said Decision and Direction of Election, and the run-off election directed and required to be conducted and held pursuant to its provisions, and in the manner and form aforesaid, is, by this Honorable Court, stayed, pending the final determination of the matters and questions raised in behalf of the Petitioners in their aforesaid Petition to Review and Set Aside the said Decision and Direction of Election, the said highly important and valuable property and personal rights of the Petitioners will be finally affected, prejudiced, and destroyed without any hearing upon or consideration by this Honorable Court of said Petition, to the final and the irreparable injury and damage of said Petitioners; and if said order of said Board of Decision and Direction of Election be not stayed, and if said election be held on said April 11, 12, 13, and 14, 1939, as further ordered, as aforesaid, by said Board through its Regional Director for the aforesaid Seventh Region, in such event the said Order of Decision and Direction of Election will have been completely and finally executed and carried out, and said election will have been actually, fully, and finally held and ended, so as to render said Petition to Review and Set Aside said Board's said Order of Decision and Direction of Election, utterly futile, abortive and nugatory, and, ipso facto, predetermine and conclude the said matters and questions of law against your Petitioners and finally dispose of and preclude them from their lawful rights and interests relating to and involved in the same, as particularly set forth in said Petition, and finally deprive them of any hearing of, and any consideration by, this

Honorable Court of their rights and interests in the premises, subjecting them finally and without relief, and without possibility of relief, to the deprivation and denial of their said rights and interests and to irreparable loss and injury as stated in their said Petition.

5. The Federal Anti-Injunction Act (Act of March 23, 1932, c. 90, 47 Stat. 70, U. S. Code, Title 29, Section 101, et seq.), commonly known as the Norris-LaGuardia Act, does not limit or affect the jurisdiction of this Honorable Court, particularly when sitting in equity, to give relief requested under the terms of the National Labor Relations Act. Section 10 (h) of the National Labor Relations Act provides:

"When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C., Supp. VII, title 29, Secs. 101–115)."

6. No other or previous application for this or similar relief has been made to any Court or Judge.

(S) ISAAC LOBE STRAUS,
Isaac Lobe Straus,
Affiant.

Subscribed to and sworn to before me, a Notary Public in and for Hamilton County, Ohio, this 8th day of April 1939.

[SEAL] (S) JOHN W. HUDSON,
John W. Hudson,
Notary Public in and for
Hamilton County, State of Ohio.

In the United States Circuit Court of Appeals for the Sixth Circuit

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 876, PETITIONERS

vs.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Opposition to application for stay

Filed April 10, 1939

To the Honorable, the JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT:

Now comes the National Labor Relations Board, by its attorneys, and opposes the application of the petitioners herein for a stay of

the Supplemental Decision and Second Direction of Election issued by the National Labor Relations Board on March 1, 1939, in In the Matter of Consumers Power Company, and International Brotherhood of Electrical Workers, Local 876, Case No. R–1004. The grounds of such opposition are set forth in the Motion to Dismiss filed herein by the National Labor Relations Board, a copy of which is attached hereto.

(S) ROBERT B. WATTS,
Associate General Counsel.
(S) DAVID C. SHAW,
(S) PHILLIP G. PHILLIPS,
Attorneys for Respondent,
National Labor Relations Board.

April 7, 1939.
Receipt acknowledged.
TAFT, STETTINIUS & HOLLISTER,
By JOHN H. CLIPPINGER,
Attys. for Petitioners.
April 8, 1939.

[Copy]

In the United States Circuit Court of Appeals for the Sixth District

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876, PETITIONERS

vs.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Motion to dismiss

Filed April 10, 1939

To the Honorable, the JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT:

Now comes the National Labor Relations Board, hereinafter referred to as the Board, by its attorneys, and moves the court, to dismiss the petition to review and set aside the Board's Supplemental Decision and Second Direction of Election issued March 1, 1939, and to deny petitioner's application for a stay of the Board's proceedings, and for its grounds respectfully states as follows:

1. A petition having been filed alleging that a question affecting commerce had arisen concerning representation of employees and requesting an investigation and certification of representatives, the Board on November 8, 1938, pursuant to Section 9 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. Sections 151, et seq.), duly issued a Decision and Direction of Election, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof,

in the proceeding before it entitled, "In the Matter of Consumers Power Company, and International Brotherhood of Electrical Workers Local 876"—Case No. 2-1004. On November 23, 1938, and on December 22, 1938, the Board issued amendments to its said Decision and Direction of Election, copies of which are attached hereto, marked "Exhibit B," and made a part hereof. Thereafter the Board, on March 1, 1939, pursuant to Section 9 (c) of the National Labor Relations Act, duly issued a Supplemental Decision and Second Direction of Election, a copy of which is attached hereto, marked "Exhibit C," and made a part hereof.

2. Thereafter, on April 5, 1939, the International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers Local Union 876, petitioners herein, filed in this court a petition to review and set aside said Supplemental Decision and Second Direction of Election. Said petition requested, among other things, that this court enter an order herein staying the said Supplemental Decision and Second Direction of Election until the final determination of the petition to review and set aside.

3. The Jurisdiction of the United States Circuit Courts of Appeals is obtained solely by virtue of the Acts of Congress. The National Labor Relations Act is the only Act of Congress which grants jurisdiction to the United States Circuit Courts of Appeals to review actions of the Board, and which contains provisions for such review. Review is accordingly limited to the provisions of that act.

4. No record of the proceeding, certified by the Board, having been filed with this Court, this Court has no jurisdiction to grant any relief to petitioners.

5. This Court has no jurisdiction to entertain the petition herein, or to grant the prayers thereof. Sections 10 (e) and 10 (f) are the only sections of the National Labor Relations Act granting jurisdiction to the Circuit Courts of Appeals to review actions of the Board. Of these, Section 10 (e) applies solely to reviews sought by the Board.

6. Section 10 (f), as well as 10 (e), applies only to the review of orders of the Board issued under Section 10 (c) of said Act, requiring employers to cease and desist from unfair labor practices prohibited by Section 8. The action of the Board in the matter now sought to be reviewed did not relate to any alleged unfair labor practice under Section 8 of the Act, did not and could not lead to any cease and desist order under Section 10 (c) of said Act, relating to such unfair labor practices, and in no way comes within the limited review afforded with respect to cease and desist orders of the Board, by Section 10 (f) of the Act.

7. This Court has no jurisdiction to entertain the petition herein, or grant the prayers thereof, because the Second Direction of Election was duly issued by the Board pursuant to a proceeding under Section 9 (c) of the Act, a purely fact-finding investigation resulting in no order or compulsion against any one, and reviewable only as expressly provided in Section 9 (d) of the Act, in connection with

a cease and desist order issued under Section 10 (c) of said Act. No such cease and desist order has or could have been made in the investigation proceeding which the Board is conducting.

8. The legislative history of the Act makes it clear that "their shall be no right to court review anterior to the holding of an election." In its report on the bill, the Senate Committee on Education and Labor stated:

"Section 9 (c) empowers the National Labor Relations Board, whenever a question affecting commerce arises concerning the representation of employees, to conduct an investigation either by secret ballot or otherwise to determine such representatives. In any such investigation, an appropriate hearing must be held.

"Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with the elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully revisable by any aggrieved party in the Federal Courts in the manner provided for in Section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action of the Board." (74th Cong., 1st Sess., Senate Report No. 573, p. 14.)

The report of the House Committee on Labor is to the same effect:

"As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to Section 9 (c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to Section 10 (e) or (f), the Baord's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under Sections 10 (b) and 10 (c)." (74th Cong., 1st Sess., House Report No. 1147, p. 23.)

9. Section 9 (d) of the National Labor Relations Act provides that whenever an order involving an unfair labor practice shall be made by the Board under Section 10 (c) based upon facts certified

following an investigation under 9 (c), and there is a petition to enforce or review such order made under Section 10 (c) the decree of the Court shall be made and entered on the transcript of the record of the entire proceeding, which shall include the certification and the record of the investigation under 9 (c).

10. Section 9 (d) does not provide for the judicial review of the proceedings under 9 (c); Section 9 (d) clearly shows that proceedings undertaken pursuant to Section 9 (c), the type involved herein, may be judicially reviewed only when the Board has issued a cease and desist order in an unfair labor practice case under 10 (c) and furthermore, only when such cease and desist order is based upon facts certified by the Board pursuant to an investigation under 9 (c).

11. The Board has not issued any cease and desist order against the petitioner, or other parties to the proceedings before it, under Section 10 in respect to any unfair labor practice. Until such order is issued, based upon the proceedings here involved, there can be no jurisdiction in this Court to review.

12. The Second Direction of Election involved herein does not require anyone, petitioner or others, to do anything or refrain from doing anything. It is not, therefore, an Order, final or otherwise. It is merely an intermediate step in an investigation being conducted pursuant to Section 9 (c) of the National Labor Relations Act. As a result of such investigation, the Board may or may not certify the name or names of employee representatives. Such certification of fact, if made by the Board, would be merely an announcement or statement of the results of its research and investigation as to what representative or representatives have been designated or selected by the particular employees concerned. Such an announcement or statement of fact is not in any sense an order.

13. This Court having no jurisdiction to review the Second Direction of Election, it likewise, for the same reasons, has no jurisdiction to grant the stay of the Second Direction of Election requested by petitioner.

Wherefore, the Board respectfully moves that the petition, to review and set aside the Board's Supplemental Decision and Second Direction of Election, and requesting a stay of the proceedings before the Board, be dismissed.

(S) ROBERT B. WATTS,
Associate General Counsel,
(S) DAVID C. SHAW,
(S) PHILLIP G. PHILLIPS,
Attorneys for respondent,
National Labor Relations Board.

Dated April 7, 1939.
Receipt acknowledged.

TAFT, STETTINIUS & HOLLISTER,
By J. H. CLIPPINGER,
Attys. for Petitioners.

163642—39——2

Exhibit A

United States of America

Before the National Labor Relations Board

IN THE MATTER OF CONSUMERS POWER COMPANY AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 876

Case No. R-1004.—Decided November 8, 1938

Electric and Gas Utility Industry—Investigation of Representatives: controversy concerning representation of employees: rival organizations; employer's refusal to grant recognition of union—Unit Appropriate for Collective Bargaining: all employees except supervisory and office employees, technical employees, and temporary common laborers, but including crew foremen, janitors and watchmen, and meter readers and bill distributors; form of self-organization; history of collective bargaining in industry as a whole—Election Ordered: labor organization which was found to be company-dominated in Decision of even date, excluded from ballot.

Mr. Charles F. McErlean, for the Board.

Bisbee, McKone, Badgley & Kendall, by Mr. Don T. McKone, and Mr. Walter D. Kline, of Jackson, Mich., for the Company.

Padway, Goldberg & Terrell, by Mr. A. G. Goldberg, of Milwaukee, Wis., for I. B. E. W.

Mr. Maurice Sugar, of Detroit, Mich. for U. W. O. C.

Mr. Frank C. Painter, of Jackson, Mich., for the Independent.

Mr. Joseph B. Robison, of counsel to the Board.

DECISION AND DIRECTION OF ELECTION

STATEMENT OF THE CASE

On February 2, 1938, International Brotherhood of Electrical Workers, Local 876, herein called I. B. E. W., filed with the Regional Director for the Seventh Region (Detroit, Michigan) a petition alleging that a question affecting commerce had arisen concerning the representation of employees of Consumers Power Company, Jackson, Michigan, herein called the Company, and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On August 12, 1938, the National Labor Relations Board, herein called the Board, acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hearing upon due notice.

On August 18, 1938, the Regional Director issued a notice of hearing, copies of which were duly served upon the Company, I. B. E. W., Independent Power Employees' Association, herein called the Independent, and Utility Workers Organizing Committee, herein called U. W. O. C., the latter two being organizations claiming to represent employees directly affected by the investigation.[2] Pursuant to the notice, a hearing was held on August 29 and 30, 1938, at Detroit, Michigan, before Tilford E. Dudley, the Trial Examiner duly designated by the Board. The Board, the Company, I. B. E. W., U. W. O. C., and the Independent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

At the commencement of the hearing, U. W. O. C. moved to intervene as a party in the proceeding. The motion was granted. The Independent made a similar motion, which was denied on the ground that the Independent was already a party by virtue of the fact that it was named in the petition. U. W. O. C. reserved its right to object to further participation by the Independent in this proceeding in the event that the Board held that that organization was company-dominated.[3] The Company made a motion to dismiss the proceeding on various jurisdictional and constitutional grounds. The motion was denied. The Company renewed the motion at the end of the hearing, at which time the Trial Examiner reserved decision. All parties were given 10 days from the end of the hearing to request oral argument before the Board. During the course of the hearing the Trial Examiner made several rulings on other motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner, including the rulings described above, and finds that no prejudicial errors were committed. The rulings are hereby affirmed. The motion on which the Trial Examiner reserved decision is hereby denied.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of the Company

Counsel for the Board, the Company, and I. B. E. W. entered into a stipulation whereby certain portions of the record in Case No.

[2] On February 2, 1938, a charge was filed by Local 740 United Electrical, Radio & Machine Workers of America, herein called the United, in *Matter of Consumers Power Company, a corporation, and Local No. 740, United Electrical, Radio & Machine Workers of America*, Case No. C-790, alleging that the Company had engaged in unfair labor practices affecting commerce, within the meaning of the Act. In a Decision and Order of even date with the instant Decision (9 N. L. R. B., No. 66), the Board found that the Company had dominated and interfered with the formation and administration of the Independent and had contributed support to it, and ordered the Company to cease and desist from such domination, interference, and support, and to refrain from recognizing the Independent as representative of any of its employees.

[3] See footnote 1, *supra*.

C–790 [1] were incorporated in the record in the instant proceeding. The stipulation was accepted by U. W. O. C. and the Independent. In a Decision in Case No. C–790, of even date with this Decision, certain findings of fact with regard to the operations of the Company are made, which are based on the portions of the record referred to in the stipulation. The findings of fact in Case No. C–790, entitled "I. The business of the respondent," are hereby incorporated in this Decision and are made a part of the Findings of Fact herein.

II THE ORGANIZATIONS INVOLVED

International Brotherhood of Electrical Workers is a labor organization affiliated with the American Federation of Labor. Local 876 thereof admits to membership electrical workers who are employees of the Company. It is divided into several branches on a geographical basis.

Utility Workers Organizing Committee is a labor organization affiliated with the Committee for Industrial Organization, herein called the C. I. O., admitting to membership employees of the Company.

Independent Power Employees' Association is an unaffiliated labor organization, which admits to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

It was stipulated by all parties that I. B. E. W., U. W. O. C., and the Independent each represents a substantial number of the Company's employees. I. B. E. W. has been organizing employees of the Company since the beginning of 1937. The Company had a contract with predecessor organizations of U. W. O. C. which was executed on June 8, 1937. The latest extension of this contract expired on September 4, 1938. All these labor organizations claim to represent all of the employees in an appropriate bargaining unit, and these claims have been called to the attention of the Company. The Company is of the opinion that none of them represents a majority. I. B. E. W. contends that an election should be held to determine representatives for the purposes of collective bargaining. U. W. O. C. denies that such an election is necessary. Counsel for the Company stated that it had no objection to the holding of an election. We find that a question has arisen concerning representation of employees of the Company.

IV. THE EFFECT OF THE QUESTION CONCERNING REPRESENTATION UPON COMMERCE

We find that the question concerning representation which has arisen, occurring in connection with the operations of the Company

[1] See footnote 1, supra.

described in Section I above, has a close, intimate, and substantial relation to trade, traffic, commerce, transportation, and communication among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE APPROPRIATE UNIT

It was agreed by all parties that a single unit composed of employees throughout the Company's entire system is appropriate for the purposes of collective bargaining. It was also agreed by stipulation at various points in the hearing that the following groups of employees should be excluded from the unit: office employees; salesmen; collectors, including those listed by the Company in its "credit and collections" departments; connected load inspectors; electrical, mechanical, and civil engineers; efficiency men and junior engineers; draftsmen; surveyors; chemists; architects; temporary common laborers hired for a specific job and for not more than 6 months; part-time local service men and local service men or agents who do not perform mechanical work in the regular course of employment; and storekeepers with supervisory powers who do no mechanical work. As to the last two categories, U. W. O. C. agreed to the exclusions contained in the stipulation, but contended that they were not broad enough. U. W. O. C. also contended that certain other groups, as described below, should be excluded. It was agreed that the exclusion of temporary common laborers was not to exclude seasonal employees. We see no reason for not excluding from the appropriate unit any of the categories of employees whose exclusion was agreed upon by the parties. We consider now the groups concerning which there is dispute, all of which U. W. O. C. wishes to exclude, and I. B. E. W. to include, in the appropriate unit. Since, as a result of our Decision and Order in Case No. C-790,[4] the Independent's claim for certification is to be disregarded, we do not consider the contentions as to the appropriate unit advanced by it.

Crew foremen.—Crew foremen are clearly supervisory employees. They direct the work of crews of from 2 to 10 men working away from headquarters on electric lines, gas mains, and the like. They have great responsibility and are consulted with regard to raises, promotions, and demotions, of the men under them. There is evidence that on some occasions they have exercised the power to discharge. The Company considers them to be supervisory employees and believes they should be excluded.

Despite the clearly supervisory nature of the duties of the crew foremen, however, we believe they should not be excluded from the appropriate unit. In case of curtailment of the Company's pay roll, they may lose their status as crew foremen and become simply members of the remaining crews. I. B. E. W. admits them to membership. U. W. O. C. and its predecessors likewise admitted them to

[4] See footnote 1, supra.

membership and attempted to bargain for them. It is clear that the crew foremen were excluded from the contracts between the Company and the C. I. O. unions solely because the Company demanded their exclusion. This was over the express opposition of the C. I. O. representatives. U. W. O. C. still numbers crew foremen among its membership. It contends that the fact that they were excluded from the contract prevented U. W. O. C. from inducing other crew foreman to join. We do not consider this argument persuasive for their exclusion. Representatives of U. W. O. C. admitted that if the crew foremen had not been excluded from the contract they would now have no objection to their inclusion in the appropriate unit. U. W. O. C. has a contract with at least one other power company which covers foremen. Finally, it is the established practice of I. B. E. W. to include foremen among its membership, to bargain for them, and to include them in its contracts.

The fact that certain employees have duties of a clearly supervisory nature does not necessarily preclude their inclusion in a bargaining unit, where, as here, it is the established practice in the industry to include them, and that practice has been recognized, as to employees of the Company in question, by the labor organizations involved. We will include crew foremen in the appropriate unit.

Plant supervisors.—The Company employs shift supervisors, who are in charge of a particular plant during one shift, and turbine-room and boiler-room supervisors, who direct the work in parts of plants, under the direction of shift supervisors. Shift supervisors do no manual work, but turbine-room and boiler-room supervisors do a limited amount of such work. A representative of the Company testified that the authority of the latter is parallel to that of the crew foremen. It appears in addition that they are in charge of substantial properties of the Company.

It thus appears that, as in the case of crew foremen, the plant supervisors have duties of a clearly supervisory nature. However, although I. B. E. W. admits them to membership, U. W. O. C. does not. Thus the case of plant supervisors differs from that of crew foremen in that U. W. O. C. does not admit the former, and has not tried to bargain for them. We will consequently adhere to our usual practice of excluding minor supervisory employees, where one of the participating labor organizations desires such exclusion.

Other supervisory employees.—There is no stipulation excluding supervisory employees generally from the unit. Such employees are eligible to membership in I. B. E. W., but not in U. W. O. C. U. W. O. C. wishes to exclude such employees from the appropriate unit, and I. B. E. W. is willing to exclude general foremen. In the absence of evidence that supervisory employees generally should be included, we will follow our usual practice and exclude them from the appropriate unit, except as specifically noted. As used hereinafter, the term, supervisory employees, means employees who have the power to hire or discharge or the power to recommend hiring or discharg-

ing, and includes general foremen, assistant foremen, plant supervisors, and all other employees above the rank of crew foremen.

Load dispatchers.—Load dispatchers have positions of considerable responsibility, and receive high salaries. Their work is not supervisory, however, since no employees work under their direction. They direct the output of the Company's various plants regarding the turning on and off of plants and adjusting loads. They anticipate load requirements and the water supply for hydraulic production. Finally, they control the Company's private communications system. The Company considers them close to management and supervision.

I. B. E. W. contends that the work of load dispatchers is merely that of switchboard operators. While it appears that their duties are of a responsible nature, we do not believe that the record shows that they should be excluded from the appropriate unit.

Meter readers and bill distributors.—Meter readers and bill distributors perform the functions their names suggest. Their duties are partly clerical, and consist otherwise of the labor of travelling from one customer to another. To some extent their work is interchangeable. Bill distributors receive lower pay than meter readers. Both work out of offices and are part of the customers' accounting department. They require no training, and although they advance most commonly into the office staff, there is nothing about their work which prepares them for either office or manual work with the Company. The Company considers them outside workers.

Both U. W. O. C. and I. B. E. W. admit meter readers and bill distributors to membership, and both have included them in contracts with other electric power companies. U. W. O. C. contends, however, that they should be excluded here because, at the insistence of the Company, they were excluded from the contracts above mentioned.

In view of the established practice of both unions here involved, and the fact that the inclusion of meter readers and bill distributors in the appropriate unit is not unreasonable, they will be included.

Janitors and watchmen.—The Company employs watchmen and janitors in office buildings and in service buildings and plants. As used herein, plant janitors and watchmen will include service building janitors and watchmen. U. W. O. C. contends that office janitors and office watchmen should be excluded. The Company contends that all watchmen should be excluded. I. B. E. W. desires the inclusion of all these groups.

We fail to see any merit in the Company's contention that the nature of the duties of the watchmen is so confidential as to require their exclusion from the appropriate unit. It appears that in some cases, the duties of watchmen and janitors may be combined in a single employee. Moreover, the watchmen are not segregated in a separate department, but work under the direction of the supervisor of the building in which they are stationed. Both unions admit

plant watchmen to membership and desire their inclusion in the appropriate unit.

We sustain the contention of U. W. O. C. with regard to office janitors and watchmen, although they are eligible to membership in both I. B. E. W. and U. W. O. C. While the duties of these employees do not differ from those of the plant watchmen and foremen, they do not come in contact with other employees who are included in the appropriate unit. Since office employees are being excluded from the unit, we will also exclude office janitors and watchmen.

Local service men.—As noted above, it was stipulated that the local service men to be excluded from the appropriate unit should include at least those who do not perform mechanical work in the regular course of employment. U. W. O. C. desires to include in the unit only those local service men who have no supervisory powers, and who devote a substantial part of their time to mechanical work.

Local service men are representatives of the Company operating in communities which are out of reach of those towns in which the Company has established operating headquarters. Their duties are to take care of any matters affecting the Company which they can handle. They receive and transmit applications for service. They turn customers' service on and off. In some cases they read meters. They make minor repairs and in some cases work even on energized lines. Finally, in case of an emergency requiring additional help, they may hire temporary employees and supervise their work.

The record shows that some local service men have joined U. W. O. C. and that U. W. O. C. has tried to bargain for them in the past. We see no reason for excluding any local service men other than those whose exclusion was agreed on.

Storekeepers.—During the course of the hearing the parties agreed to the exclusion of storekeepers with supervisory powers who do not ordinarily do mechanical work. The record does not clearly show whether U. W. O. C. maintained its position that other storekeepers should be excluded.

The work of storekeepers varies from those who are in charge of large storerooms, who do little or no mechanical work, and who have power to hire and discharge, to others who have no assistants and who do other work such as that of timekeepers or pay-roll clerks. A representative of the Company stated that he considered that those whose work was largely clerical should be excluded and that those whose work was largely manual should be treated as operating employees.

We see no reason for excluding any storekeepers other than those whose exclusion was agreed upon.

We find that all the employees of the Company, excluding general and assistant foremen, plant supervisors, and other supervisory employees except as expressly included below, office employees, office building janitors and watchmen, collectors, connected load inspectors,

electrical, mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service men who do not perform mechanical work in the regular course of employment, and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including crew foremen, load dispatchers, meter readers and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, constitute a unit appropriate for the purposes of collective bargaining and that said unit will insure to employees of the Company the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

VI. THE DETERMINATION OF REPRESENTATIVES

It is not contended that either of the labor organizations here involved can be certified without the holding of an election, nor is there any evidence in the record on which such a certification could be based. Hence we find that the question concerning representation which has arisen can best be decided by holding an election by secret ballot. Since we have held in a decision of even date [5] that the Independent has been dominated, interfered with, and supported by the Company, its name will not appear on the ballot.

At the hearing all parties but U. W. O. C. agreed that in the event an election was directed by the Board, employees of the Company on the pay roll of July 31, 1938, should be eligible to participate. Counsel for U. W. O. C. reserved judgment, and thereafter expressed no opinion. Counsel for the Company stated that he was informed that the pay roll would not change materially for 2 or 3 months. No reason was offered for the selection of July 31. We will therefore direct that employees within the appropriate unit, who were on the pay roll of the Company for the pay-roll period next preceding the date of the commencement of the hearing, August 29, 1938, will be eligible to vote.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. A question affecting commerce has arisen concerning the representation of employees of Consumers Power Company, Jackson, Michigan, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

2. All the employees of the Company, excluding general and assistant foremen, plant supervisors, and other supervisory employees except as expressly included below, office employees, office building

[5] See footnote 1, supra.

janitors and watchmen, collectors, connected load inspectors, electrical mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service men who do not perform mechanical work in the regular course of employment, and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including crew foremen, load dispatchers, meter readers, and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

Direction of Election

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

Directed that, as part of the investigation authorized by the Board to determine representatives for the purposes of collective bargaining with Consumers Power Company, Jackson, Michigan, an election by secret ballot shall be conducted within forty-five (45) days from the date of this Direction, under the direction and supervision of the Regional Director for the Seventh Region, acting in this matter as agent of the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among all the employees of the Company, excluding general and assistant foremen, plant supervisors, and other supervisory employees except as expressly included below, office employees, office building janitors and watchmen, collectors, connected load inspectors, electrical, mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service men who do not perform mechanical work in the regular course of employment, and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including crew foremen, load dispatchers, meter readers, and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, who were on the pay roll of the Company for the pay-roll period next preceding August 29, 1938, except those who have since quit or been discharged for cause, to determine whether they desire to be represented by International Brotherhood of Electrical Workers, Local 876, or by Utility Workers Organizing Committee, for the purposes of collective bargaining, or by neither.

Exhibit B

United States of America

Before the National Labor Relations Board

IN THE MATTER OF CONSUMERS POWER COMPANY and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 876

Case No. R-1004

AMENDMENT TO DECISION AND DIRECTION OF ELECTION

November 23, 1938

On November 8, 1938, the National Labor Relations Board, herein called the Board, issued a Decision and Direction of Election [1] in the above-entitled proceedings. The Board hereby amends its Decision by adding, after the second paragraph of Section VI, the following paragraph:

"We will direct the election to be held under the direction and supervision of the Regional Director for the Seventh Region, who shall determine in his discretion the exact times, places, and procedure for giving notice of the elections and for balloting. We expressly authorize the use of the United States mail for such purposes and the use of agents, if feasible, to journey through the Company's various territorial divisions to conduct elections at appropriate places, collecting the votes in sealed containers for delivery to the Regional Director. In providing for the taking of ballots by mail, the Regional Director shall specify the date by which envelopes containing returned ballots must be mailed. Ballots returned in envelopes postmarked at a later date shall not be counted. Each employee who is permitted to vote by mail shall be notified of the date by which he must mail his ballot. The date so fixed by the Regional Director shall not in any event be later than January 7, 1939." [2]

The Board hereby amends its Direction of Election by striking therefrom the words, "within forty-five (45) days from the date of this Direction," and substituting therefor the words "within sixty (60) days from the date of this Direction."

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[1] 9 N. L. R. B., No. 67.

[2] See *Matter of Pacific Gas and Electric Company* and *United Electrical & Radio Workers of America*, 3 N. L. R. B. 835; and *Matter of Pacific Greyhound Lines* and *Brotherhood of Locomotive Firemen and Enginemen*, 4 N. L. R. B. 520.

United States of America

Before the National Labor Relations Board

IN THE MATTER OF CONSUMERS POWER COMPANY and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 876.

Case No. R–1004

Unit Appropriate for Collective Bargaining: crew foremen, minor supervisory employees, excluded, because of participation in unfair labor practices by Company.

SECOND AMENDMENT TO DECISION AND DIRECTION OF ELECTION

December 22, 1938

On November 8, 1938, the National Labor Relations Board, herein called the Board, issued a Decision and Direction of Election [1] in the above-entitled proceedings. Utility Workers Organizing Committee, herein called U. W. O. C., filed a motion, dated November 22, 1938, to amend the Decision and Direction of Election by excluding crew foremen, load dispatchers, meter readers, and bill distributors, and certain local service men from the unit found to be appropriate and from participation in the election directed by the Board; to incorporate in the record of this case the record and findings in Matter of Consumers' Power Company, a corporation, and Local No. 740, United Electrical, Radio & Machine Workers of America, Case No. C–790; [2] to provide an opportunity for a voter to vote for either of the unions appearing on the ballot without expressing a choice between them; to grant oral argument upon the above matters; to permit the filing of briefs in support of the motion; and to postpone the election, if necessary. Consumers Power Company, herein called the Company, filed an answer to this motion, dated November 28, 1938, in which it objected to the taking of any action by the Board which would delay the holding of an election in this matter. On November 29, 1938, the Board issued an order, copies of which were served on all of the parties, in which it denied the motion of U. W. O. C., except in so far as it concerned the question of the exclusion of crew foremen from the appropriate unit and from participation in the election.[3] The order also directed the Regional Director for the Seventh Region to segregate the ballots of the crew foremen and to keep them segregated and uncounted until a further order concerning their disposition was made by the Board.

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[1] 9 N. L. R. B., No. 67. An Amendment to the Decision and Direction of Election was issued on November 23, 1938, 9 N. L. R. B., No. 67a. The amendment dealt with the manner of conducting the election.

[2] 9 N. L. R. B., No. 66.

[3] The Company's answer was received by the Board in Washington, D. C., after the above-described order was issued.

On November 29, 1938, the Board also issued a notice of hearing before the Board in Washington, D. C., on December 12, 1938, for the purpose of oral argument concerning the question of crew foremen. Copies of the notice of hearing were served upon the Company, U. W. O. C., and International Brotherhood of Electrical Workers, Local 876, herein called the I. B. E. W. These three parties were likewise granted until December 12, 1938, to file briefs.

Pursuant to the notice, a hearing was held before the Board at Washington, D. C., on December 12, 1938. I. B. E. W. and U. W. O. C. were represented by counsel and participated in the argument. U. W. O. C. filed a brief which the Board has considered.

The Board, having considered the matter, hereby grants the motion of U. W. O. C. to exclude crew foremen from the unit found to be appropriate and from participation in the election. Accordingly, the Board hereby amends its Decision as follows:

The subsection entitled "Crew foremen" of Section V of the Findings of Fact is omitted, and the following substituted therefor:

"Crew foremen are clearly supervisory employees. They direct the work of crews of from 2 to 10 men working away from headquarters on electric lines, gas mains, and the like. They have great responsibility and are consulted with regard to raises, promotions, and demotions of the men under them. There is evidence that on some occasions they have exercised the power to discharge. In case of curtailment of the Company's pay roll, however, they may lose their status as crew foremen and become simply members of the remaining crews. The Company considers them to be supervisory employees and believes that they should be excluded.

"I. B. E. W. admits crew foremen of the Company to membership. It is the established practice of I. B. E. W. in the industry generally to include foremen, to bargain for them, and to include them in the coverage of its contracts. U. W. O. C. and its predecessors likewise admitted crew foremen to membership and attempted to bargain for them. It is clear that the crew foremen were excluded from the contracts between the Company and the C. I. O. unions solely because the Company demanded their exclusion. This was over the express opposition of the C. I. O. representatives. Although the first contract between the Company and U. W. O. C., excluding crew foremen, was entered into in June 1937, U. W. O. C. attempted to have these employees included as recently as February 1938.

"U. W. O. C. still numbers some crew foremen among its membership, although many who were formerly members have dropped out or have ceased paying dues. Crew foremen are no longer sought as members by U. W. O. C., which contends that it has been unable to induce them to join because of their exclusion from the contract. Representatives of U. W. O. C. admitted, however, that if the crew foremen had not been excluded from the contract they would now have no objection to their inclusion in the appropriate unit. U. W. O. C. has a contract with at least one other power company which covers foremen.

"In addition to the facts stated above, we take notice of the facts found by us in our Decision in Case No. C-790.[a] We there found that crew foremen of the Company had been instrumental in the commission by the Company of certain unfair labor practices. The findings include the following:

"'Thus, from the testimony of executive officers, as well as the employees themselves, it is clear that the respondent has conferred power upon its crew foremen which enables them effectively to coerce the employees and to interfere with their right to self-organization.

"'As described above, Markle, Parker, Sheets, and McDonald possess even greater supervisory powers than the crew foremen. The latter, looking to them for guidance, unquestionably charted their activities against the C. I. O. and in support of the Independent in accordance with the course so clearly defined by their superiors.'

"In an earlier Decision[b] an important consideration in determining the propriety of excluding minor supervisory employees from an appropriate unit was stated as follows:

"'The subforemen and group leaders belong to a class of minor supervisory employees whose inclusion in or exclusion from a unit made up of production workers must depend largely upon the particular facts in each case. Where, as here, there is a history of rivalry among labor organizations claiming to represent employees, it is important that the employer be free from the imputation of coercing his employees in their choice of representatives. Since subforemen and group leaders are in some measure identified with management, it is not improbable that their participation in a controversy between rival unions will lead to charges of employer interference. We will, therefore, exclude subforemen and group leaders, as well as general foremen, from the unit.'

"It has been our practice to exclude minor supervisory employees where one of the participating labor organizations desires such exclusion. Although U. W. O. C. has admitted crew foremen and has attempted to bargain for them in the past, we believe that the activities of crew foremen on behalf of the Company, as found by us in Case No. C-790 to have occurred, justify the present position of U. W. O. C. We will accordingly exclude crew foremen from the appropriate unit."

The second paragraph of the subsection entitled "Plant supervisors" of Section V of the Findings of Fact is amended so that it will read as follows:

"It thus appears that, as in the case of crew foremen, the plant supervisors have duties of a clearly supervisory nature. I. B. E. W. admits them to membership, but U. W. O. C. does not. We will consequently adhere to our usual practice of excluding minor supervisory employees, where one of the participating labor organizations desires such exclusion."

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[a] See footnote 1, supra.
[b] Matter of Rex Manufacturing Company, Inc. and A. F. of L. Federal Local Union No. 20893, 7 N. L. R. B. 95.

The subsection entitled "Other supervisory employees" of Section V of the Findings of Fact is amended by altering the last sentence thereof so as to read as follows:

"As used hereinafter, the term, supervisory employees, means employees who have the power to hire or discharge or the power to recommend hiring or discharging, and includes general foremen, assistant foremen, plant supervisors, crew foremen, and all other employees whose status is similar to or superior to that of crew foremen."

The last paragraph of Section V of the Findings of Fact is amended to read as follows:

"We find that all the employees of the Company, excluding general and assistant foremen, plant supervisors, crew foremen, and other supervisory employees except as expressly included below, office employees, office building janitors and watchmen, collectors, connected load inspectors, electrical, mechanical, and civil engineers, efficiency men and junior engineers, draftsmen, surveyors, chemists, architects, temporary common laborers hired for a specific job and for not more than 6 months, part-time local service men and local service men who do not perform mechanical work in the regular course of employment; and storekeepers with supervisory powers who do not ordinarily do mechanical work, but including load dispatchers, meter readers and bill distributors, plant janitors and watchmen, and storekeepers other than those excluded above, constitute a unit appropriate for the purposes of collective bargaining and that said unit will insure to employees of the Company the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act."

The second conclusion of law is amended by inserting after the words, "plant supervisors," the words, "crew foremen," and by omitting after the words, "but including," the words, "crew foremen."

The Board hereby amends its Direction of Election by inserting after the words, "plant supervisors," the words, "crew foremen," and by omitting after the words, "but including," the words, "crew foremen."

In our Order of November 29, 1938, we directed the Regional Director for the Seventh Region to segregate and keep uncounted the ballots of crew foremen. The Regional Director is hereby directed not to receive any ballots from crew foremen of the Company in the election in this proceeding and to disregard any ballots already cast by such crew foremen.

The Acting Regional Director having notified the Board that additional time is required for the holding of the election, the Board hereby amends its Direction of Election, as amended, by striking therefrom the words, "within sixty (60) days from the date of this Direction" and substituting therefor the words, "within seventy (70) days from the date of this Direction."

(Supplemental Decision and Second Direction of Election, March 1, 1939, omitted in printing. It appears on page 21, supra.)

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United States Circuit Court of Appeals—Sixth Circuit

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL.

vs.

THE NATIONAL LABOR RELATIONS BOARD

Before HICKS, SIMONS, and ALLEN, JJ.

The Petitioners, having filed in the office of the Clerk of this Court their Petition verified April 4, 1939, for the Review and Setting Aside of the final Order of the National Labor Relations Board, designated Decision and Direction of Election, entered and issued March 1, 1939, and the Petitioners having made application, by way of Motion, to the court, supported by the affidavit of their Counsel, Isaac Lobe Straus, Esquire, vertified April 8, 1939, for a Stay of Decision and Direction of Election of the National Labor Relations Board pending the hearing and determination of said Petition for Review by this Court and the entry of an Order or Decree thereon,

It is, this tenth day of April 1939, by the United States Circuit Court of Appeals for the Sixth Circuit, ordered that, pending the hearing and determination of said petition for Review by this Court and the entry of an Order or Decree thereon, the said Order, designated Decision and Direction of Election of the National Labor Relations Board, dated March 1, 1939, be and hereby is in all respects stayed.

Approved for entry:

(S) XEN HICKS,
Circuit Judge.

Filed April 10, 1939.
A true copy.
Attest:

J. W. MENZIES,
Clerk, U. S. Circuit Court of Appeals, Sixth Circuit.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of motion of petitioners for stay of order of National Labor Relations Board; opposition to application for stay; motion of Board to dismiss petition to review and exhibits attached thereto in the case of International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers.

Local Union 876 vs. The National Labor Relations Board, No. 8267, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 10th day of July, A. D. 1939.

J. W. MENZIES,
Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit

Cause argued and submitted

May 10, 1939

Before HICKS, SIMONS, and ALLEN, JJ.

This cause is argued by Isaac L. Straus and John H. Clippinger for Petitioners and by Philip G. Phillips for Respondent and is submitted to the Court.

Order

Entered June 28, 1939

On Petition to Review and Set Aside an Order of the National Labor Relations Board.

This cause came on to be heard on the transcript of record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged that the "Second Directions of Election" ordered by the National Labor Relations Board on March 1, 1939, be and the same is set aside.

Opinion

Filed June 28, 1939

United States Circuit Court of Appeals, Sixth Circuit

No. 8267

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876, PETITIONERS

v.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On petition to review and set aside an order of the National Labor Relations Board, entered and issued March 1, 1939, in the matter of Consumers Power Company and International Brotherhood of Electrical Workers, Local Union 876

Filed June 28, 1939. John W. Menzies, clerk.

Decided June 28, 1939

Before HICKS, SIMONS, and ALLEN, Circuit Judges

HICKS, Circuit Judge. International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876, filed their petition in this court to review and set aside a Supplemental Decision and Second Direction of Election issued by The National Labor Relations Board. The Board moved to dismiss the petition upon the ground that this court has no jurisdiction to entertain it. A transcript of the proceedings before the Board sufficient for present purposes has been filed.

Petitioners aver that Local Union 876 is an organization of wage workers and a constituent of I. B. E. W. and that both organizations are affiliated with the American Federation of Labor; that Local Union 876 is composed of wage workers in the employ of Consumers Power Company, a public utility corporation.

On February 2, 1938, I. B. E. W. filed with the Regional Director a petition alleging that a question affecting commerce had arisen concerning the representation of employees of the Company and requesting an investigation and certification of representatives for collective bargaining.

Pursuant to Sec. 9 (c) of the National Labor Relations Act, the Board directed an investigation and authorized a hearing which was participated in by petitioners and the Utilities Workers Organizing Committee, another labor organization composed of employees of the Company and affiliated with the Congress for Industrial Organization. Both these organizations claimed to represent the employees of the Company.

The Board found that a question affecting commerce had arisen concerning the representation of the Company's employees and directed that an election by secret ballot be conducted under the super-

vision of the Regional Director to determine whether the employees desired to be represented by the I. B. E. W. or by the U. W. O. C. or by neither. The Regional Director conducted the election and reported to the Board the results as follows:

Total Number of Employees Eligible	2,977
Total Number of Ballots Cast	2,806
Total Number of Votes for I. B. E. W.	1,072
Total Number of Votes for U. W. O. C.	1,164
Total Number of Votes for Neither	503
Total Number of Challenged Ballots	52
Total Number of Blank Ballots	1
Total Number of Void Ballots	11

The result indicated that a majority of the voters desired to bargain collectively but that neither organization had received a majority of the votes cast. Thereupon, over the protest and objection of petitioners, the Board promulgated what is styled a "Supplemental Decision and Second Direction of Election." The Board directed "that as a part of the investigation authorized by the Board to determine representatives for the purposes of collective bargaining with Consumers Power Company * * * an election by secret ballot shall be conducted * * * among all the employees of the Company, excluding * * * to determine whether or not they desire to be represented by Utility Workers Organizing Committee for the purposes of collective bargaining."

It is this "Second Direction of Election" which petitioners seek to have reviewed and set aside. We are not concerned here with unfair labor practices as between employer and employee set out in Sec. 10 of the Act. We are dealing with the procedure for the designation of representatives of employees for purposes of collective bargaining, described in Sec. 9, a concededly different matter. It is the policy of the United States, set forth in the third paragraph of Sec. 1 of the Act, to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment, or other mutual aid or protection. In Labor Board v. Greyhound Lines, 303 U. S. 261, the court, at page 265, said:

"The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees the rights established by § 7 to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 23, 33. This appears both from the formal declaration of policy in § 1 of the Act, National Labor Relations Board v. Jones & Laughlin Steel Corp., supra, 22–24, and from § 7, in itself a declaration of the policy which, in conjunction with § 10 (c), it adopts as the controlling guide to administrative action."

Section 7 of the Act guarantees to employees the right to bargain collectively through representatives of their own choosing and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection. Associated Press v. Labor Board, 301 U. S. 103, 123; Labor Board v. Jones & Laughlin, 301 U. S. 1, 33. It was said in the Jones & Laughlin case that this is a fundamental right. See also Texas & N. O. R. Co. v. Railway Clerks, 281 U. S. 548, 571.

Having made the guaranty, it was necessary that the Congress should adopt a procedure for the selection of such representatives. To this end, Sec. 9 (a) provides that representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining, etc. There is thus provided the simple American principle of majority rule. Virginian Ry. Co. v. System Federation No. 40, etc., 84 Fed. (2d) 641, 652 (C. C. A. 4).

By Sec. 9 (c) it is provided that whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. This section further provides that the Board may take a secret ballot of employees to ascertain such representatives.

The order complained of purports to have been promulgated under this section. We think the order was illegal and that the proposed election was unfair in effect. It was in the teeth of the policy formulated in the statute, that the employees should be protected in the exercise of full freedom of designation of representatives of their own choosing. The employee was not given full freedom of choice. If he voted he could either ratify or reject the nominee of the Board but if he rejected it he was through. He had no alternative—he could not choose for himself. He could take the representative offered him or none at all—a parallel of Hobson's choice.

Moreover, the order violates the "majority rule" provided by Sec. 9 (a). The intention of this section is that a majority of those voting should select their representatives. If a majority should indicate by their ballots that they did not desire to be represented by the U. W. O. C., nothing has been accomplished. No selection of representatives has been made and collective bargaining falls, notwithstanding that in the first election 2,238 out of 2,806 voters indicated their desire for collective bargaining. The purpose of the election was to select, not to reject, representatives. Nothing more need be said touching the invalidity of the order.

Respondent urges that the Act makes no provision for judicial review in the instant case; that petitioners' right of review is by Sec. 9 (d) to be held in abeyance until a final order in an unfair labor practice controversy [Sec. 10 (a)], which in some degree or manner

involves petitioners' complaint, comes up for review. But there is no controversy here over labor practices as between the Company and its employees. Indeed, it is not shown that any such controversy exists. It may never arise, or if it should, it may never be presented here.

In this situation, does this court have jurisdiction to review the order complained of, which as we have pointed out, destroys the right of petitioners, guaranteed by Sec. 7 of the Act, in the exercise of full freedom to bargain collectively with the Company through representatives of their own choosing? We think it does. We cannot think that the Congress overlooked this important matter. The right of employees to choose their own representatives for collective bargaining was generally recognized and conceded long before it was guaranteed by the National Labor Relations Act. (See the discussion in Labor Board v. Jones & Laughlin, 301 U. S. at page 33.) This essential property right was not only guaranteed but was safeguarded; otherwise the Act itself would be subject to serious inquiry as to whether it violates the due process clause of the Fifth Amendment.

Section 10 (f) provides—

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business * * * by filing in such court a written petition praying that the order of the Board be modified or set aside."

Petitioners are "persons" as defined in Section 2 (1) of the Act. They reside and transact business in this circuit. For the reasons above indicated they are justly aggrieved by the order of the Board complained of, which denied to them their rights under Sections 7 and 9 of the Act.

Respondents insist that the order is not final but it was final not only in its effect but in that it was the last order to be made under the procedure set out in the Act for the determination of representatives of employees for the purposes of collective bargaining with the Company. It is true that if the election had been held it was the duty of the Board to certify the result; but a certificate is not an order.

Finally, it is said that the phrase "wherein the unfair labor practice in question was alleged to have been engaged in" found in Sec. 10 (f) limits the right of judicial review of procedure involving unfair labor practices only, as described in Sec. 10 of the Act. It certainly permits a review of the procedure in such character of controversy but does not confine it thereto.

The Supreme Court did not so limit it in Edison Co. v. Labor Board, 305 U. S. 197, 226. See also the discussion touching jurisdiction under Sec. 10 (f) found in In re Labor Board, 304 U. S. 486,

493; and in Ford Motor Co. v. Labor Board, 305 U. S. 364, 369. While the case is before the court upon respondent's motion to dismiss for lack of jurisdiction, yet it has nevertheless been fully briefed and argued upon the merits. The facts are not disputed and we think that our conclusion as to the jurisdictional question necessarily concludes the controversy.

It is therefore ordered that the order complained of be and the same is set aside.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of Petition to Review and Set Aside Order of the National Labor Relations Board and Exhibits Thereon, and transcript of proceedings in U. S. C. C. A., in the case of International Brotherhood of Electrical Workers et. al. vs. National Labor Relations Board, No. 8267, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 30th day of June, A. D. 1939.

J. W. Menzies,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

U. S. GOVERNMENT PRINTING OFFICE 1939

57 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is assigned for argument immediately following No. 70.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

[Endorsement on cover:] File No. 43660. United States Circuit Court of Appeals, Sixth Circuit. Term No. 253. National Labor Relations Board, petitioner, vs. International Brotherhood of Electrical Workers and International Brotherhood of Electrical Workers, Local Union 876. Petition for a writ of certiorari and exhibit thereto. Filed August 1, 1939. Term No. 253 O. T. 1939.

U. S. GOVERNMENT PRINTING OFFICE 1939